# Customs Bulletin

**Regulations, Rulings, Decisions, and Notices concerning Customs and related matters**

# and Decisions

**of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade**

Vol. 25 | DECEMBER 11, 1991 | No. 50

*This issue contains:*



**AVAILABILITY OF BOUND VOLUMES**
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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# U.S. Customs Service

## *Treasury Decisions*

### ERRATA

(T.D. 91–90)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR OCTOBER 1991

Treasury Decision 91–90, originally published in entirety in the CUSTOMS BULLETIN, Vol. 25, No. 47, dated November 20, 1991, omitted the following daily rates:

| | |
|---|---|
| Greece drachma: | |
| October 3, 1991 | $0.005381 |
| Taiwan N.T. dollar: | |
| October 3, 1991 | $0.037793 |

(LIQ–03–01 S:NISD CIE)
Dated: November 26, 1991.

MICHAEL MITCHELL,
*Chief,*
*Customs Information Exchange.*

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### ERRATA

(T.D. 91–91)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR OCTOBER 1991

Treasury Decision 91–91, originally published in entirety in the CUSTOMS BULLETIN, Vol. 25, No. 47, dated November 20, 1991, incorrectly published variances from the quarterly rates for October 1991. The rates as published do not vary from the quarterly certified rates published in Treasury Decision 91–85.

(LIQ–03–01 S:NISD CIE)
Dated: November 26, 1991.

MICHAEL MITCHELL,
*Chief,*
*Customs Information Exchange.*

# U.S. Customs Service

## *General Notice*

### APPLICATION FOR RECORDATION OF TRADE NAME: "GRAND TEA COMPANY"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "GRAND TEA COMPANY," used by Thomas Li Ka Cheung, a citizen of Hong Kong with an address at 363 Queen's Road Central, Hong Kong.

The application states that the trade name is used in connection with tea. The merchandise is manufactured in Hong Kong.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before January 31, 1992.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Room 2104), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Robert L. Knapp, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202) 566–6956.

Dated: November 26, 1991.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, December 2, 1991 (56 FR 61277)]

## APPLICATION FOR RECORDATION OF TRADE NAME: "M.T.R. CONDIMENTS"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "M.T.R. CONDIMENTS," used by MTR Imports, Inc., a corporation organized under the laws of the State of Illinois, located at 18 West 194 Holly Avenue, Westmont, Illinois 60559.

The application states that the trade name is used in connection with various Indian food product mixes and powers. The merchandise is manufactured in India.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before January 31, 1992.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Room 2104), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-6956).

Dated: November 26, 1991.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, December 2, 1991 (56 FR 61278)]

## APPLICATION FOR RECORDATION OF TRADE NAME: "M.T.R. DISTRIBUTORS (P) LTD."

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "M.T.R. DISTRIBUTORS (P) LTD.," used by MTR Imports, Inc., a cor-

poration organized under the laws of the State of Illinois, located at 18 West 194 Holly Avenue, Westmont, Illinois 60559.

The application states that the trade name is used in connection with various Indian food product mixes and powers. The merchandise is manufactured in India.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before January 31, 1992.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Room 2104), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-6956).

Dated: November 26, 1991.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, December 2, 1991 (56 FR 61277)]

## APPLICATION FOR RECORDATION OF TRADE NAME: "M.T.R. FOOD PRODUCTS"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "M.T.R. FOOD PRODUCTS,." used by MTR Imports, Inc., a corporation organized under the laws of the State of Illinois, located at 18 West 194 Holly Avenue, Westmont, Illinois 60559.

The application states that the trade name is used in connection with various Indian food product mixes and powers. The merchandise is manufactured in India.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of

the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before January 31, 1992.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Room 2104), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202–566–6956).

Dated: November 26, 1991.

JOHN F. ATWOOD,
*Chief,*
*Intellectual Property Rights Branch.*

[Published in the Federal Register, December 2, 1991 (56 FR 61277)]

# U.S. Customs Service

## *Proposed Rulemakings*

19 CFR Parts 4, 10, 102, 134, and 177

PROPOSED CUSTOMS REGULATIONS AMENDMENTS REGARDING RULES OF ORIGIN APPLICABLE TO IMPORTED MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document extends the period of time within which interested members of the public may submit comments on proposed amendments to the Customs Regulations regarding rules of origin applicable to imported merchandise. Customs has received several requests to extend the comment period to allow additional time to prepare responsive comments. The comment period is extended 45 days.

DATE: Comments are requested on or before January 9, 1992.

ADDRESSES: Comments may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John Valentine, Office of Regulations and Rulings (202–566–8530).

SUPPLEMENTARY INFORMATION:

### Background

A document was published in the Federal Register (56 FR 48448) on September 25, 1991, proposing to amend the Customs Regulations to set forth a uniform rule governing the determination of the country of origin of imported merchandise which is wholly obtained or produced in a single country. The document also proposed to amend the Customs Regulations to establish rules, applicable for most Customs and related purposes, for determining the country of origin of imported base metals and articles of base metals which are not wholly obtained or produced in a single country and which are classifiable in chapters 72, through 83 of the Harmonized Tariff Schedule of the United States. The proposal solicited public comments that were to be received on or before November 25, 1991.

Customs has received several requests to extend the period of time for comments. The requesters stated that additional time is required for study and analysis in order to prepare responsive comments both in regard to the general impact of the proposal and in regard to the specific proposals concerning base metal products. Customs believes that the requests have merit. Accordingly, the period of time for the submission of comments is being extended 45 days.

Dated: November 26, 1991.

HARVEY B. FOX,
*Director,*
*Office of Regulations and Rulings.*

[Published in the Federal Register, December 2, 1991 (56 FR 61214)]

# U.S. Court of Appeals for the Federal Circuit

FARREL CORP. APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND POMINI FARREL S.P.A. AND POMINI, INC., INTERVENORS

Appeal No. 91-1111

(Decided November 22, 1991)

*Marc S. Palay, Jones, Day, Reavis & Pogue*, of Washington, D.C., argued for appellant. With him on the brief were *Donald B. Ayer* and *Jeffrey E. Grell*.

*Scott Anderson*, Office of the General Counsel, of U.S. International Trade Commission, Washington, D.C., argued for appellee. With him on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel. *Edward Kancler*, Benesch, Friedlander, Coplan & Aronoff, of Cleveland, Ohio, argued for intervenors. With him on the brief were *Kevin H. Young* and *Mark A. Phillips*. Also on the brief were *Tom M. Schaumberg, V. James Adduci, III* and *Anri Suzuki*, Adduci, Mastriani, Meeks & Schill, of Washington, D.C.

Appealed from: U.S. International Trade Commission.

Before MICHEL, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*.

MICHEL, *Circuit Judge*.

Farrel Corporation ("Farrel") appeals the decision of the U.S. International Trade Commission ("ITC" or "Commission") terminating its investigation under 19 U.S.C. § 1337 (1988) on the basis of a prior agreement between Farrel and respondent/intervenor Pomini Farrel S.p.A. ("Pomini") to arbitrate certain disputes. *In re Certain Internal Mixing Devices and Components Thereof*, Inv. No. 337-TA-317 (U.S. Int'l Trade Comm'n) (Nov. 2, 1990). Because the governing statutory section, 19 U.S.C. § 1337(c), does not authorize the termination of ongoing investigations except in certain specified circumstances not present here, the Commission's premature termination in light of an arbitration agreement was contrary to law, and therefore, we reverse.

## BACKGROUND

### *The Licensing Agreements*

Farrel manufactures and distributes worldwide heavy machinery used in mixing rubber and plastics. Pomini, an Italian corporation, also sells imported rubber and plastics processing machinery in competition with Farrel. Complaint, as amended, *In re Certain Internal Mixing Devices and Components Thereof*, Inv. No. 337-TA-317, (U.S. Int'l Trade Comm'n) (July 24, 1990) ("ITC Complaint").

From 1957 until 1986, Farrel and Pomini entered into a series of licensing agreements allowing Pomini to manufacture, using Farrel's technology, land sell a line of rubber and plastics mixing machines worldwide, with the exceptions of the United States, the United Kingdom and Japan. The agreements included provisions requiring that all designs, specifications, drawings, blueprints, photographs, reproductions, and other materials be returned by Pomini on the expiration of the contractual relationship.

Each of the licensing agreements contained an arbitration clause requiring that "all disputes" be resolved by arbitration under the International Chamber of Commerce ("ICC"). For example, in 1973 Farrel and Pomini entered into an agreement, superseding an earlier agreement, that extended Pomini's rights to make and sell the machinery with continued technical assistance from Farrel. The agreement contained the following provision governing arbitration of disputes:

> All disputes arising in connection with the present Agreement shall be finally settled by arbitration. Arbitration shall be conducted in Geneva, Switzerland, in accordance with the rules of Arbitration of the International Chamber of Commerce.
>
> Judgment upon the award rendered may be entered in any Court having jurisdiction, or application may be made to such Court for a judicial acceptance of the award and an order of enforcement, as the case may be.

Farrel/Pomini License Agreement, paragraph 28, Mar. 22, 1973. On January 1, 1976, Pomini and Farrel renewed the 1973 Agreement for an additional ten-year period, providing that the agreement was to continue in force thereafter unless either party gave six months' prior written notice of termination. While the Agreement did change some provisions of its 1973 predecessor, it did not alter the arbitration clause.

*Civil Actions Against Pomini*

On January 1, 1986, in accordance with the license provisions, Farrel terminated "Pomini's rights to use or to retain any Farrel technology." Farrel Br. at 8. Approximately seven months later, Pomini announced that it planned to enter the U.S. market and supply American customers with internal mixing devices and components it manufactured in Italy. Farrel later alleged to the ITC that Pomini was able to do this by using trade secrets which Pomini had misappropriated from Farrel. ITC Complaint at 15–18. As a result, Farrel charged that it "has lost significant business to Pomini [,] * * * has been forced to furlough some of its work force, and is threatened with further decreases in production workers, sales staff and technical staff, through layoffs or attrition." Farrel Br. at 8.

In response to what it characterized as "Pomini's unfair competition," Farrel filed a complaint against Pomini in the Tribunal of Busto Arsizio, an Italian civil court, alleging inter alia, the misappropriation of trade secrets and infringement of various patents and trademarks registered in Italy. Farrel Br. at 8–9. A similar suit was filed in the Scottish

Court of sessions, in which Farrel alleged that Pomini infringed certain of its patents and trademarks registered in the United Kingdom. In both suits, Pomini asserted, as an affirmative defense, the "existence of binding arbitration agreements between the parties requiring that all disputes * * * be resolved by an arbitration panel of the [ICC]," and therefore both tribunals were precluded from ruling on the merits of Farrel's claims.[1] Pomini Br. at 3.

On June 29, 1988, Farrel also filed suit in the United States District Court for the Northern District of Ohio, alleging that Pomini and its newly-formed U.S. marketing subsidiary, Pomini, Inc. (collectively "Pomini"), committed various patent and trademark-related violations, and seeking injunctive relief as well as treble and punitive damages. *Farrel Corp. v. Pomini, Inc.*, Civ. Action No. C88–2161A (N.D. Ohio). Pomini responded by filing a Motion to Stay Proceedings and to Compel Arbitration, based on the agreements' arbitration clauses. On September 10, 1990, the district court granted Pomini's motion, holding that if Farrel desired to pursue its claim against Pomini, it must do so before an ICC arbitration panel.[2]

On October 9, 1990, pursuant to 28 U.S.C. § 1295(a)(1) (1988), which grants this court exclusive appellate jurisdiction over suits involving patents, Farrel filed a notice of appeal from the district court's order to the Federal Circuit. On Farrel's request, that appeal was dismissed by this court on December 28, 1990.

*Proceedings Before the Commission*

Meanwhile, on July 24, 1990, Farrel filed a complaint against Pomini with the Commission, alleging that Pomini violated 19 U.S.C. § 1337(a) in the importation and sale of internal mixing machines and their components by misappropriating trade secrets, committing trademark infringement and falsely representing the manufactures' source. Farrel petitioned for an immediate cease and desist order under 19 U.S.C. § 1337(f) and a limited permanent exclusion order forbidding entry into the United States of Pomini's internal mixing devices. ITC Complaint at 29. In its complaint, Farrel alleged the existence of the then-pending Ohio district court proceedings.

On the basis of the allegations contained in Farrel's complaint, the Commission voted on August 21, 1990, to institute an investigation. Although the Commission was informed of the pending district court action and Pomini's Motion to Compel Arbitration, the Commission decided to institute an investigation based on Farrel's allegations and did not reach the arbitrability issue, because that question was, according to the ITC investigating attorney, "not presently before the Commission."

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[1] Farrel has since dismissed the Scottish action.

[2] The district court did note, however, that its determination of the arbitrability of claims under both the trademark and the technology licensing agreements was contingent upon confirmation by the arbitrator. *Farrel Corp. v. Pomini, Inc.*, No. C88–2161A, slip op. at 27 (N.D. Ohio) (Sept. 10, 1990).

After official institution of the investigation, Pomini filed a Motion for Summary Determination, seeking, *inter alia*, termination of the Commission's investigation on the basis of the arbitration agreement between the parties and responses to the complaint which asserted the existence of the arbitration agreement as an affirmative defense against Farrel's allegations.

On October 3, 1990, the administrative law judge ("ALJ") assigned to the case issued an initial determination terminating the investigation based on: (1) the existence of the arbitration clauses in the technology licensing agreements; (2) a previous Commission decision terminating an investigation in light of an arbitration agreement, *In re Certain Fluidized Bed Combustion Systems*, U.S.I.T.C. Pub. 1752, Inv. No. 337–TA–213 (Final) (Sept. 1985); and (3) the preclusive effect of the Ohio district court decision.

Farrel filed a petition for review of the ALJ's initial decision, appealing only its misappropriation of trade secrets claim.[3] The Commission, in a lengthy and detailed opinion, affirmed the initial decision to terminate the investigation. *In re Certain Internal Mixing Devices and Components Thereof*, Inv. No. 337–TA–317 (U.S. Int'l Trade Comm'n) (Nov. 2, 1990) (Comm'n Op."). In reaching its determination, the Commission recognized that

> a party to an international transaction will be required to honor its agreement to arbitrate disputes involving statutory claims under U.S. law when the arbitration agreement reaches the statutory issues and when there are no legal constraints external to the agreement which foreclose arbitration of such claims.

*Id.* at 6 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Commission did not base its determination on the statutory language or legislative history of section 337, but, instead, on the broad federal policy favoring enforcement of arbitration agreements. According to the Commission, compelling arbitration is proper, where, as here, the "claim of trade secret misappropriation is 'inextricably connected to the license agreement,'" and no "legal constraints external to the parties' agreement which foreclose[d] arbitration" exist. Comm'n Op. at 8, citing *Fluidized Bed*, slip op. at 5. The Commission rejected Farrel's contentions that Pomini waived its arbitration rights during the Italian litigation, that collateral estoppel was inapplicable because the district court's opinion dealt only with a "preliminary" matter, that the Commission's *Fluidized Bed* decision should be overruled, and that, in the alternative, the Commission should "self-initiate" an investigation into the section 337 violations that Farrel alleged.

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[3] Farrel did not contest the termination of the investigation as to the trademark infringement and false representation of source claims which were found by the district court to be subject to arbitration. The misappropriation of trade secrets claim, however, was not alleged before the district court. In addition, Farrel did not seek review of the positions it asserted before the ALJ that are not relevant to this appeal.

A dissenting Commissioner noted that section 337(a) provides that a violation "shall be dealt with, in addition to any other provision of law * * *" and has been the basis for ITC investigations proceeding concurrently with district court actions, reasoning that termination of the instant investigation "giv[es] greater deference to an arbitral tribunal than it [does] to a U.S. District Court." Dissent from Comm'n Op. at 2 (Rohr, Comm'r, dissenting). Nor, Commissioner Rohr explained, is the Supreme Court's decision in *Mitsubishi* controlling, or even applicable, as the Commission majority assumed. *Id.* He noted that case simply adopted a limited exception to the principle that antitrust claims are not capable of arbitration. *Id.* Finally, Commissioner Rohr argued, "no overriding policy [exists] to defer the case to arbitration." *Id.* at 3. On the contrary, he concluded, "[a]rbitration cannot effectively vindicate [a] complainant's section 337 rights [because the] timing of relief to complainant through arbitration will likely only be available to complainant far beyond the strictly enforced time limitation of section 337." *Id.*

On appeal to this court, Farrel argues that the Commission's decision is contrary to the statutory language of and Congressional intent underlying section 337, and that *Mitsubishi* is inapplicable to the arbitrability of section 337 claims.

## Discussion

### I

We have jurisdiction of this appeal pursuant to 28 U.S.C. § 1295(a)(6) (1988) (jurisdiction over final determinations relating to unfair trade practices made under section 337)[4] and 19 U.S.C. § 1337(c) (1988). While this court generally reviews ITC interpretations of statutory provisions *de novo*, some deference to constructions by the agency charged with its administration may be appropriate, particularly if technical issues requiring some expertise are involved. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See Corning Glass Works v. United States Int'l Trade Comm'n*, 799 F.2d 1559, 1565, 230 USPQ 822, 826, 4 Fed. Cir.(T) 118, 122 (1986); *Texas State Comm'n for the Blind v. United States*, 796 F.2d 400, 406 (Fed. Cir. 1986) ("The issue to be decided by this court is whether the statute is capable of more than one interpretation and whether the agency's interpretation is reasonable."). Such deference is limited, however, by "our obligation to honor the clear meaning of a statute, as revealed by its lan-

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[4] The present appeal is distinguishable from *Block v. United States Int'l Trade Comm'n*, 777 F.2d 1568, 228 USPQ 37 (Fed. Cir. 1985), in which this court dismissed an appeal from the U.S. International Trade Commission (ITC) for lack of jurisdiction after the ITC terminated "the investigation as abated." *Id.* at 1570, 228 USPQ at 38. Because the ITC terminated its investigation without ruling on the merits, this court held that the ITC's dismissal was not an appealable final determination. *Id.* at 1568, 228 USPQ at 37. Further, because the ITC's dismissal was without prejudice to request a second investigation, the court held that the dismissal was neither intrinsically a final determination nor the equivalent of a final determination. *Id.* at 1571, 228 USPQ at 38–39. In the instant case, however, the dismissal was with prejudice and, since petitioner cannot request reopening, must be considered a final determination. As such, it is subject to this court's review. *Amgen, Inc. v. United States Int'l Trade Comm'n*, 902 F.2d 1532, 1537, 14 USPQ2d 1734, 1739 (Fed. Cir. 1990).

guage, purpose, and history." *Al Tech Specialty Steel Corp. v. United States*, 745 F.2d 632, 642, 3 Fed. Cir. (T) 1, 13 (1984) (quoting *Southern [sic] Community College v. Davis*, 442 U.S. 397, 411 (1979)) (further citations omitted). *See Corning Glass*, 799 F.2d at 1565, 230 USPQ at 826, 4 Fed. Cir. (T) at 122.

Under section 377, the Commission has exclusive authority to investigate, either on the basis of a complaint or on its own initiative, allegations that foreign importers are, *inter alia*, engaging in "[u]nfair methods of competition and unfair acts in the importation of articles," 19 U.S.C. § 1337(a)(1)(A), or "infring[ing] a valid and enforceable United States patent," 19 U.S.C. § 1337(a)(1)(B)(i). The statute also establishes procedures the Commission must follow in its investigations, and sets strict timetables for their completion. *See Sealed Air Corp. v. United States Int'l Trade Comm'n*, 645 F.2d 976, 987, 209 USPQ 469, 478–79 (CCPA 1981) (describing the procedures under the statutory framework). The ITC, through its staff, conducts the investigations independently of the wishes of the parties, and in reaching its final determination on an alleged violation *must* consider factors that may or may not interest the parties: the "public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United states consumers." 19 U.S.C. § 337(c).

On appeal, Farrel "seeks to remedy the abdication by the [Commission] of its duty under section 337 * * * to investigate and deal with unfair acts in the importation and sale of articles into the United states, the threat or effect of which is to destroy or substantially injure a domestic industry." Farrel Br. at 16–17. Farrel contends that the Commission, by relying on a private contractual arbitration agreement to terminate its investigation, acted contrary to the statute. According to Farrel, the language of section 337 is clear: Once the Commission begins a section 337 investigation, section 337(c) authorizes termination of the investigation only in limited and specific circumstances – after its entry of a consent order or approval of a settlement agreement between the parties.[5] Because neither of these conditions precedent to termination was satisfied in this investigation, Farrel contends that termination was improper. At least where complainant objects, for the reasons set forth below, we agree.

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[5] Investigation under section 337 may also be terminated "[i]f the Commission has reason to believe the matter before it is based *solely* on alleged acts and effects which are within the purview of" the countervailing duty and antidumping laws. 19 U.S.C. § 1337(b)(3) (emphasis added). None of the parties on appeal contend that the termination procedures under section 337(b)(3) are implicated in this case.

Other situations could arise where a section 337 investigation may be terminated without a conclusive determination. For example, we decline to address whether the ITC has authority to terminate an investigation where the complaint is withdrawn before the ITC concludes an investigation. In the instant case, however, the investigation was terminated over the objection of the complainant. We also decline to address whether the ITC could terminate an investigation where the issue becomes moot, for example because of the expiration of the patent.

Section 337 provides that "[t]he Commission *shall investigate* any alleged violation of this section on complaint under oath or upon its initiative," 19 U.S.C. § 1337(b)(1) (emphasis added), and further states that

> [t]he Commission *shall determine*, with respect to each investigation conducted by it under this section, *whether or not there is a violation* of this section, except that the Commission may, by issuing a consent order or on the basis of a settlement agreement, terminate any such investigation, in whole or in part, without making such a determination.

19 U.S.C. § 1337(c) (emphasis added).

The use of "shall" in a statute is "the language of command," *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977), and where "the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of the administrative action." 1 N. Singer, *Sutherland Statutory Construction* § 4.18, at 174 (4th ed. 1985). On its face, the statutory language states that after a section 337 investigation is instituted,[6] its non-conclusive termination may be based on those grounds explicitly provided for in the statute itself. The statutory exceptions in section 377(c) must be interpreted narrowly and neither the Commission nor Pomini contends that the arbitration agreement could somehow be characterized as a consent order or a settlement agreement between the parties.

To recognize an additional exception as the Commission implies that we should, would not only violate traditional canons of statutory interpretation, but, in this case, would create an exception inconsistent with those specified by Congress. As the Commission concedes, in terminating an investigation on either of the two grounds recognized in section 337(c), it has discretion, *after* reviewing the settlement agreement or the proposed consent order, to terminate an investigation. The Commission admits that such oversight, which ensures that the public interest will be taken into account, is absent when, as here, the ITC declines to exercises its jurisdiction. In the instant case, an arbitral award had not yet been determined and thus could not have been reviewed by the Commission.

In light of the exceptions' clear, precise language and the Commission's ability to review consent orders and settlement agreements, this court cannot create an additional and inconsistent statutory exception. *See* 2A N.Singer, *Sutherland Statutory Construction* § 47.11, at 144–45 (4th ed. 1985). Therefore, based on the plain language of section 337(B)(1) and (c), we conclude that the Commission acted contrary to law by terminating its investigation on the basis of an arbitration agreement without first determining whether a violation existed as required under section 337. The ITC has not pointed to anything in the legislative history that suggests that Congress intended section 337 to have any-

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[6] We do not decide here, nor need we on the facts of this case, whether the Commission may refuse to initiate an investigation on the basis of the existence of a contractual arbitration agreement between the parties.

thing other than its plain meaning. Nor, as discussed below, did our own review find legislative history that supports the Commission's view.

II

The Commission argues that such a reading of section 337(c) limits ITC discretion too narrowly because the statute also provides that "[a]ll legal and equitable defenses may be presented in all cases." 19 U.S.C. § 1337(c). While we agree with the Commission that an arbitration agreement may be considered an equitable defense in certain circumstances,[7] given section 337's text and its legislative history, the Commission's understanding of the provision is too expansive and, if adopted by this court, would severely limit the protection afforded by the statute.

The Commission argues that it "has authority pursuant to section 337(c) to terminate an investigation without making a determination regarding unfair acts after considering the assertion of a defense." Gov't Br. at 13. However, this reading by the Commission only underscores its confusion as to what the "present[ation]" of "[a]ll legal and equitable defenses" provision entails. While the statute does require the Commission to consider defenses, nowhere in the text does language appear permitting termination of an investigation without concluding, as section 337(c) commands, whether a violation exists. Clearly, a defense asserted under the "all defenses" provision would allow the Commission to find that no violation exists or to temper any relief ultimately granted, but neither the plain language of the statute nor the legislative history suggests that any defense raised should excuse the Commission from making any determination whatsoever. The report of the Senate Finance Committee states, "section 337(c) * * * require[s] that the Commission determine whether there is a violation of this section *in each investigation it conducts.*" S. Rep. No. 1298, 93d Cong., 2d Sess. 195, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7328 (emphasis added). The joint committee report further states that the Commission must consider "all legal and equitable defenses * * * *in the determination of violations of the statute.*" *Id.* at 7329 (emphasis added).

The legislative history also makes clear that the "all defenses" provision was not intended to deprive the Commission of its jurisdiction to conclude section 337 investigations, but rather to afford the accused party a "full due process hearing" before the Commission "determine[s] whether there is a violation * * * *in each investigation it conducts.*" *Id.* at 7328 (emphasis added). Section 337(c)'s legislative history convincingly establishes that the "all defenses" provision was enacted to protect the public interest "in cases where there is any evidence of price gouging or monopolistic practices in the domestic industry" by the complainant. *Id.* at 7330. The provision also allows "the Commission to review the va-

[7] *See, e.g., Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 452 (1935) ("the *special* defense setting up the arbitration agreement is an equitable defense") (emphasis added); *Hilti, Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968) (upholding assertion of defense of arbitration).

lidity and enforceability of patents." *Id.* at 7329. To adopt the Commission's reasoning that an equitable defense can be raised to abort an inquiry before the public interest can be considered, turns the purpose of section 337 on its head.

This construction of the "all defenses" provision is in no way contrary, as the Commission contends, to the reasoning of *Young Eng'rs Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 219 USPQ 1142 (Fed. Cir. 1983), in which this court held that the Commission could consider the *res judicata* effect of a judicial determination. *Id.* at 1316, 219 USPQ at 1150. The Commission argues that "[t]his reasoning is particularly relevant to this case given the Commission's finding that an arbitration proceeding would provide the same, and possible [sic] more remedies than remedies available in the Commission proceedings." Gov't. Br. at 27. What the Commission fails to recognize, however, is that no arbitral award had yet been made in this case against which *res judicata* could have applied. In any event, the relevant threshold issue is not the availability of remedies but whether the Commission can avoid its statutorily mandated duty to reach a determination because of a private arbitration agreement. In addition, the *res judicata* effects of a collateral proceeding, whether in another judicial or administrative forum, go to the merits of a complainant's claim, and not to the exercise of jurisdiction of the tribunal. Even in Young Engineers, despite consideration of the *res judicata* effects of a judicial decision, the Commission was not excused from making a final determination on the existence of violations. Although, as the Commission points out, this court stated that "if a second court proceeding would be precluded, there seems [to be] no reason that the Commission must devote time and attention to the matter," it went on to add that preclusion only applied to that "phrase" of the claim already litigated. *Id.* at 1315, 219 USPQ at 1151. Thus, the defense of *res judicata* did not prevent the Commission from reaching a final determination of violation, but simply excused it from re-opening an already fully and fairly litigated fact issue.

III

Finally, as noted above, the Commission based its decision not on the grounds advanced by the Commission on appeal, but solely on the broad federal policy favoring arbitration, especially in international transactions. The Commission's decision to terminate the instant investigation, as well as that in the *Fluidized Bed* case cited by the ITC, relied heavily on *Mitsubishi*, in which the Supreme Court held that an agreement to arbitrate conflicts arising from an international contract should be enforced by an American district court, even though the claims were based on the antitrust laws and not the contract's terms. 473 U.S. at 629. Underlying its decision, the Court said, was the "em-

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[8] In any event, it appears quite possible that, in exercising its broad discretionary powers to fashion an appropriate remedy, the Commission can consider remedies ordered by an arbitral forum. That such discretion may be available does not excuse it from reaching a determination of what remedy is appropriate.

phatic federal policy in favor of arbitral dispute resolution," which applies with special force in the field of international commerce." *Id.* at 631.

However, while we disagree with Farrel's characterization of *Mitsubishi* as simply holding that "certain statutory, antitrust claims [are] arbitrable, we ultimately conclude that the rationale of *Mitsubishi* does not support the ITC's termination of the instant proceeding. *Mitsubishi*'s reasoning rests in large part on the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (1988), which, by its terms, has particular relevance to *judicial* recognition of arbitration agreements. The Commission, of course, is not a court, and it has exclusive jurisdiction to administer section 337, which lacks provisions allowing for private enforcement either in the courts or through arbitration.

Even assuming, *arguendo*, that the strong preference for enforcement of arbitration agreements extends beyond the courtroom doors, section 337 actions are still excluded from its ambit. As the Supreme Court noted in *Mitsubishi*, not "all controversies implicating statutory rights are suitable for arbitration," 473 U.S. at 627, and

> [j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

*Id.*

Among the various factors which indicate whether a statutory claim is not arbitrable is Congress' intent to waive the right of access to a particular decisionmaking forum. *Id.* at 628. Such evidence, the Court explained, "will be deducible from the text or legislative history [of the statute]. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has envinced an intention to preclude a waiver of judicial [or administrative] remedies for the statutory rights at issue." *Id.* (citations omitted).

Farrel argues that section 337(a)'s provision that violations, "when found by the Commission to exist shall be dealt with, *in addition to any other provision of law,*" clearly evinces Congress' intent that section 337's protection and procedures cannot be waived by an arbitration agreement. Farrel Br. at 22–23. By this language, "Congress implicitly recognized that more than one proceeding might result from its statutory scheme." *In re Convertible Rower Exerciser Patent Litigation*, 616 F. Supp. 1134, 1143, 228 USPQ 726, 732 (D. Del. 1985). Indeed, the legislative history of section 337 indicates that the statute was designed to

supplement other provisions of law, which were viewed as inadequate to fully protect U.S. industries from unfair foreign trade practices.[9]

Furthermore, section 337(b)(1), limiting the discretion of the Commission to suspend investigations, provides additional evidence that Congress views the Commission's role in investigating possible violations as unique and beyond the scope of purely private enforcement. Section 337(b)(1) allows the Commission to toll from the statutorily imposed one-year or 18-month limitations for completion on an investigation, "any period of time during which such investigation is suspended *because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.*" 19 U.S.C. § 1337(b)(1) (emphasis added). Clearly, this language indicates that Congress not only envisioned the Commission retaining jurisdiction while a concurrent proceeding progressed, but it also strongly suggests that the only other fora that may effect an on-going investigation are federal government agencies and courts. By not exercising its jurisdiction simply because of a contractual arbitration clause, the Commission "giv[es] greater deference to an arbitral tribunal than * * * a U.S. District Court." Dissent from Comm'n Op. at 2. Such strained logic cannot comport with the complex statutory trade scheme Congress has fashioned over the last seventy years.

In any event, while *Mitsubishi* did address an international arbitration agreement, more on point to the facts here, we believe, is *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991), decided after the Commission's decision in this case. In *Gilmer*, the Supreme Court held that a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* (1988), can be subjected to compulsory arbitration pursuant to an arbitration agreement, with the arbitration agreement acting as a waiver of the right of access to a judicial forum. Although the Court stated that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," it recognized the different effect that an arbitration agreement has on the judicial and administrative tribunals' proper exercise of jurisdiction. *Id.* at 1652.

Like Farrel, which sought relief both in the district court and at the Commission, the petitioner in *Gilmer* sought to enforce his rights under ADEA in the district court and at an administrative agency, the Equal Employment Opportunity Commission ("EEOC"). The Supreme Court, however, noted that the arbitration agreement operated as a waiver of the right of access only to the *judicial* and not the *administrative* forum. *Gilmer*, ___ U.S. at ___, 111 S. Ct. at 1653 ("An individual ADEA claimant subject to an arbitration agreement *will still be free to file a*

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[9] As this court has previously noted, in the Twelfth Annual Report of the United States Tariff Commission 21 (1928), the Commission stated:

> Existing law, apart from section [337], is wholly inadequate to protect domestic owners of patents from violation of their patent rights through the importation and sale of infringing articles.

*Lannom Mfg. Co. v. United States Int'l Trade Comm'n*, 799 F.2d 1572, 1577, 231 USPQ 32, 36, 4 Fed. Cir. (T) 131, 136–37 (1986).

*charge* with the EEOC, even though the claimant is not able to institute a private judicial action."). Answering the concern that employers could circumvent ADEA by requiring an arbitration clause in employment contracts, the Court explained that EEOC review and enforcement were not precluded:

> Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependant on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. (Citations omitted.)

*Gilmer,* ____ U.S. at ____; 111 S. Ct. at 1653. Because the Commission, like the EEOC, is by statute available to a specific class of complainants, has independent authority to investigate alleged or apparent wrongs, and possesses a statutory mandate to promote the public interest, we see no compelling reason to treat the Commission any differently than the EEOC. Just as the EEOC's unique protection may not be privately contracted away, neither should the Commission's. Therefore, we hold that the Commission erred by relying on the broad federal policy favoring arbitration as a ground to terminate an on-going section 337 investigation in circumstances where the statute enumerates only two limited and specific circumstances for terminations concededly not present in this case.

### Conclusion

The Commission acted contrary to law by terminating an ongoing investigation because of an arbitration agreement. The language of section 337(c) explicitly limits the circumstances in which the Commission may terminate an investigation without reaching a determination as to whether a violation exists. Neither of those circumstances was present here. In any event, the authority the Commission relies on is inapplicable to this case. The Commission's decision terminating the instant investigation is reversed and the case is remanded. On remand, the Commission should reinstate its investigation of Farrel's complaint and determine, as the statute requires, whether a violation of section 337 exists.

## REVERSED AND REMANDED

### Costs

Each party is to bear its own costs.

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

*Judges*

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

*Senior Judges*

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

# Decisions of the United States Court of International Trade

(Slip Op. 91-98)

ZENITH ELECTRONICS CORP., PLAINTIFF, UNITED ELECTRICAL WORKERS OF AMERICA, INDEPENDENT, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AND THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO, PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, FUJITSU GENERAL LTD., NEC HOME ELECTRONICS, LTD., NEC TECHNOLOGIES, INC., FUNAI ELECTRIC CO., MITSUBISHI ELECTRIC CORP., MITSUBISHI ELECTRIC SALES AMERICA, INC., SHARP CORP., AND SHARP ELECTRONICS CORP., DEFENDANT-INTERVENORS

Court No. 89-09-00514

MITSUBISHI ELECTRIC CORP., MITSUBISHI ELECTRIC SALES AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, ZENITH ELECTRONICS CORP., DEFENDANT-INTERVENOR

Court No. 89-10-00545

NEC HOME ELECTRONICS, LTD. AND NEC HOME ELECTRONICS (USA), INC. PLAINTIFFS *v.* UNITED STATES, DEFENDANT, ZENITH ELECTRONICS CORP., DEFENDANT-INTERVENOR

Court No. 89-09-00535

SHARP CORP. AND SHARP ELECTRONICS CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, ZENITH ELECTRONICS CORP., DEFENDANT-INTERVENOR

Court No. 89-09-00541

[Defendant's motion for consolidation denied]

(Dated November 14, 1991)

*Frederick L. Ikenson, P.C.* (*Frederick L. Ikenson*) for plaintiff Zenith Electronics Corporation.

*Collier, Shannon & Scott* (*Paul D. Cullen, Laurence J. Lasoff* and *Mary J. Staley*) for plaintiff-intervenors United Electrical Workers of America, *et al.*

*Stuart M. Gerson*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); Of-

fice of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Joan L. Mackenzie*), of counsel, for defendant.

*Siegel, Mandell & Davidson* (*Brian S. Goldstein*) for defendant-intervenors Fujitsu General Ltd. and Funai Electric Company.

*Paul, Weiss, Rifkind, Wharton & Garrison* (*Robert E. Montgomery, Jr.* and *Frank J. Schuchat*) for defendant-intervenors NEC Home Electronics, Ltd. *et al.*

*Baker & McKenzie* (*Thomas P. Ondeck* and *Kevin M. O'Brien*) for defendant-intervenors Mitsubishi Electric Corporation *et al.*

*Donovan, Leisure, Newton & Irvine* (*Peter J. Gartland* and *Thomas R. Trowbridge, III*) for defendant-intervenors Sharp Corporation *et al.*

## MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge*: The United States has moved to consolidate Court Numbers 89–09–00514, 89–10–00545, 89–09–00535, 89–09–00541. Zenith consents to the motion and has filed a response in support of the consolidation. The United Electrical Workers, *et al.*, Fujitsu General Ltd., and Funai Electric Co., Ltd. also consent to consolidation. NEC, Mitsubishi and Sharp oppose the motion. The Court finds that the administrative difficulties posed by consolidation outweigh the benefits to be derived from it, and denies the motion.

Defendant's motion is filed under Rule 42(a) of this Court which states

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated under a consolidated complaint; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The rule gives the court broad discretion to grant or deny consolidation. *Manuli, USA, Inc. v. United States*, 11 CIT 272, 277, 659 F. Supp. 244, 247 (1987).

Each of the cases defendant seeks to consolidate concerns the Department of Commerce determination in *Television Receivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 54 Fed. Reg. 35,517 (Aug. 28, 1989). Each case seeks review of Commerce's calculation of dumping margins. The government argues that consolidation is therefore appropriate.

Zenith argues in support of the motion that the Mitsubishi, NEC and Sharp cases challenge the margins determined by Commerce in the order as too high. Zenith's case asserts that the margins for Mitsubishi and NEC are too low. The issues in the Zenith case must be resolved before final relief would be possible on remand in the other cases, Zenith maintains.

The cases, through related, are distinct. Sharp contests the use of best information available to determine its antidumping margin NEC and Mitsubishi challenge the details of the computations used by Commerce. Zenith also challenges the details of Commerce's computations of the Mitsubishi and NEC margins, but the specific aspects challenged

differ among the cases. In addition, the review periods at issue are different for each of the cases.[1]

The large number of parties and issues, many of which are not common to all of the cases, weighs against consolidation. The burden of briefing and responding to motions rises disproportionately with the proliferation of parties and issues. Currently, the interests of the parties are reflected in the styling of the cases. Opening all of the issues to briefing by every party would unnecessarily complicate disposition of the cases.

Further, the procedural postures of the cases vary. Sharp's Rule 56.1 motion for judgment on the agency record is pending and now ripe for decision. Consolidation of that case with the others would slow its resolution. Conversely, the Mitsubishi case is stayed pending decision of Zenith. An outcome adverse to Zenith in the Zenith case could render the Mitsubishi case moot.

The Court concludes that the interest of judicial economy will be better served if the cases are not consolidated. Accordingly, the Court, in its discretion, denies defendant's motion to consolidate.

(Slip Op. 91–99)

INTERNATIONAL CARGO & SURETY INSURANCE CO. (INSURER FOR DATA MEMORY CORP.), PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–01–00042

[Defendant's motion for summary judgment granted.]

(Decided November 15, 1991)

*Glad & Ferguson* (*Edward N. Glad*), for plaintiff.

*Stuart M. Gerson*, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Mark S. Sochaczewsky*), United States Department of Justice, Civil Division, *Edward N. Maurer*, United States Customs Service, of counsel, for defendant.

## OPINION

RESTANI, *Judge*: Plaintiff, International Cargo and Surety Insurance Company ("International") brought this action pursuant to 28 U.S.C. § 1581(a) (1988), contesting denial by the United States Customs Service ("Customs") of its protest concerning liquidation of an entry of merchandise. International contends that the merchandise was liquidated by operation of law at the rate of duty assessed at the time of entry. De-

[1] The review periods at issue in Mitsubishi fell between April 1983 and February 1985; in NEC, between April 1983 and February 1987; those at issue in Sharp fell between April 1980 and March 1981.

fendant contends that it extended the time for liquidation and additional duties were properly assessed. The case is before the court on cross motions for summary judgment.

BACKGROUND

International is the surety for Data Memory Corporation, the importer of computer disk drives[1] that entered Los Angeles, California on September 2, 1987. At the time of entry, the Treasury Department and Customs Service Headquarters ("Headquarters") were reconsidering classification of data-processing peripheral devices in light of a July 1987 Customs ruling. On August 14, 1987, Headquarters directed all district directors to withhold liquidation of entries of data-processing peripheral devices until further notice. Customs claims that notices extending the time for liquidation were printed on February 6, 1988, and mailed to Data Memory Corporation and International on approximately February 9, 1988.[2] International denies that it received notice of the extension.

On March 18, 1988, Headquarters notified the Los Angeles district to resume liquidation of data-processing peripheral devices, and provided guidelines for classification. The guidelines state that classification depends on design and use. Disk drives designed for incorporation into data processing units are classified as automatic data-processing parts under item 676.54 of the Tariff Schedules of the United States ("TSUS"), whereas "stand-alone devices" are classified as office machines under item 676.30, TSUS.

To classify the disk drives in this case in accordance with the guidelines, the Lose Angeles district needed information about design and use. On June 20, 1988, Customs issued a Request for Information (Form CF 28) to the importer. The importer failed to respond. On October 4, 1988, Customs issued a Notice of Action (Form CF 29), stating that as the importer had failed to provide the requested information the disk drives would be classified as office machines, dutiable at 3.7 percent ad valorem.[3] The entry was liquidated on October 21, 1988.

Both International and the government move for summary judgment. International has not responded to the government's motion.

STANDARD OF REVIEW

A decision to extend the time to liquidate an entry will be upheld if it is proper under the statute, and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *see Detroit Zoological Society v. United States*, 10 CIT 133, 137–38, 630 F. Supp. 1350, 1356 (1986) (decisions to extend liquidation

[1] International describes the merchandise as "floppy disks"; the government claims entry papers establish the merchandise consists of "disk drives." As International did not respond to the government's motion, the court assumes the government is correct.

[2] In support of this claim, Customs has submitted declarations from two computer specialists. These declarations are discussed *infra*.

[3] Neither the CF 28 nor CF 29 are attached to the government's moving papers. The government states that the CF 29 is attached, but it is not.

reviewed for arbitrariness and abuse of discretion); *Bar Bea Truck Leasing Co. v. United States*, 4 CIT 138, 140 (1982) (citations omitted) (when agency action is discretionary but a law applies, standard of review is arbitrary, capricious or not in accordance with law).

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56(d), Rules of the Court of International Trade. The party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file", designate "specific facts showing that there is genuine issue for trial."" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citing Fed. R. Civ. P. 56(e)).

## DISCUSSION

1. *Legislative Scheme:*

Imported merchandise which is not liquidated within one year of its entry date is deemed liquidated at the rate asserted at the time of entry. 19 U.S.C. § 1504(a).[4] Customs may extend the period in which to liquidate an entry under three specific circumstances, including when "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1); *see* 19 C.F.R. § 159.12(a)(1)(i).[5] To extend the time to liquidate, Customs must give notice of the extension to the importer of record in the form and manner prescribed in the regulations. 19 U.S.C. § 1504(b). The regulations provide that Customs shall give notice on Custom Form 4333–A, and the notice shall state the reason for the extension. 19 C.F.R. § 159.12(b). Failure to provide proper notice re-

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[4] 19 U.S.C. § 1504(a) provides, in part:

**(a) Liquidation.** – Except as provided in subsection (b) of this section, and entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

* * * * * * *

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted a the time of entry by the importer of record.

19 U.S.C. § 1504(a) (1988).

[5] 19 U.S.C. § 1504(b) provides:

**(b) Extension.** – The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if–

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer of record requests such extension and shows good cause therefor.

19 U.S.C. § 1504(b) (1988).

19 CFR § 159.12(a) provides:

(a) *Reasons* – (1) *Extension*. The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) *Information needed by Customs*. Information needed by Custom for the proper appraisement or classification of the merchandise is not available, or

(ii) *Importer's Request*. The importer requests an extension in writing before the statutory period expires and shows good cause why the extension should be granted. "Good cause" is demonstrated when the importer satisfies the district director that more time is needed to present to Customs information which will affect the pending action, or there is a similar question under review by Customs.

(2) *Suspension*. The 1-year liquidation period may be suspended as required by statute or court order.

19 C.F.R. § 159.12(a) (1991).

sults in liquidation by operation of law. *Enron Oil Trading and Transportation Co. v. United States*, 15 CIT ___, Slip Op. 91–91 at 3 (Sept. 27, 1991) (citing *Pagoda Trading Co. v. United States*, 9 CIT 407, 411, 617 F. Supp. 96, 99 (1985), *aff'd*, 804 F.2d 665 (Fed. Cir. 1986)).

Prior to the enactment in 1978 of 19 U.S.C. § 1504, Customs could delay liquidation as long as it pleased, with or without giving notice. *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1562 (Fed. Cir. 1984); *see* S. Rep. No. 95–778, 95th Cong., 2d Sess. 1, 32 (1978), *reprinted in*, 1978 U.S. Code Cong. and Adm. News 2211, 2243. Section 1504 was enacted to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." S. Rep. No. 95–778, 95th Cong., 2d Sess. at 32, *reprinted in*, 1978 U.S. Code Cong. and Adm. News at 2243; *see Ambassador*, 748 F.2d at 1562–63. It was also enacted to accommodate requests from trade partners that the government establish a time limit within which liquidation must occur. *Id.*

2. *Extension of Time To Liquidate:*

In support of its assertion that proper notice was given, Customs has submitted declarations from two Customs' computer analysts. *See Declaration of William G. Hines* (*"Hines Declaration"*) and *Declaration of Raymond Fouch* (*"Fouch Declaration"*). These declarations state that Customs does not maintain paper copies of extension notices, but information concerning entries is stored on a computer database called Automated Commercial System ("ACS"). *Hines Declaration*, paras. 2, 4; *Fouch Declaration*, para. 5. Information relating to extension notices is stored within ACS in the "extension/suspension history file"; it is also stored in another ACS file known as the "entry summary header file." *Hines Declaration*, paras. 4–6. When an issue arises concerning notice, Customs usually produces a printout from the extension/suspension history file. *Hines Declaration*, paras. 8. In this case, due to a computer error, the extension/suspension history files for the day in question were "lost"; as a substitute, Customs has produced the entry summary header file. *Hines Declaration*, para. 8–9. This printout contains encoded data, which, according to the declaration, establishes that notices to Data Memory Corporation and International were printed on February 6, 1988; the notices stated that an extension was required because Customs needed to obtain information. *Hines Declaration*, para. 7. As a routine matter, notices are printed at the Customs Data Center in Springfield, Virginia on a Saturday or Sunday and mailed the following Tuesday; therefore, a notice printed on February 6, 1988, a Saturday, would have been mailed on about Tuesday, February 9, 1988. *Fouch Declaration*, paras. 4, 6. Between April 1979 and May 1989, Customs mailed approximately 28,000 notices each week. *Fouch Declaration*, para. 2.

Government officials are entitled to a presumption that their duties are performed in the manner required by law. *Star Sales & Distributing Corp. v. United States*, 10 CIT 709, 710, 663 F. Supp. 1127, 1129 (1986);

*see Enron*, 15 CIT at ____, Slip Op. 91–91 at 4. In this case, therefore, a presumption arises that proper notice was given. The presumption is not conclusive, and may be rebutted by a declaration or other evidence indicating that notice was not received. Recently, in *Enron*, this court found that an affidavit from the importer's recordkeeper, stating that an extension notice had not been received, was sufficient to rebut the presumption and defeat summary judgment. 15 CIT at ____, Slip op. 91–91 at 9–10. No such evidence was produced in this case. International makes the naked assertion in its "Statement to Accompany Motion for Summary Judgment" that Customs failed to give notice. International did not provide any evidence to support its assertion, nor did it submit an opposition to the government's motion for summary judgment. As International has failed to rebut the presumption that notice was given, the only issue to be decided is whether the extension was permissible under the statute.

Customs claims the extension was necessary because the Los Angeles district needed information from Headquarters in order to classify the disk drives.[6] The question, therefore, is whether these circumstances fall within 19 U.S.C. § 1504(b)(1), which permits an extension when "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1); *see* 19 C.F.R. § 159.12(a)(1)(i). The "appropriate" customs officer is the officer making the decision to liquidate—in this case, the Los Angeles district director.

The scope of § 1504(b)(1) was considered in *Detroit Zoological Society v. United States*, 10 CIT 133, 630 F. Supp. 1350 (1986). In *Detroit Zoo*, the issue was whether an extension was justified under § 1504(b)(1) when the plaintiff requested that Customs seek internal advice on classification of an entry. *See id.* at 138, 630 F. Supp. at 1356. The court found the extension was proper under the statute, and held:

> The term "information," as it is used in the statute, 19 U.S.C. § 1504(b)(1) (1982), * * * should be construed to include **whatever is reasonably necessary for proper appraisement or classification of the merchandise involved**. When a request for internal advice of a classification decision is granted, the "information" required to make the appropriate classification includes that advice. An extension of liquidation is thus justified in such a case if additional time is needed to obtain the internal advice and to consider it before making the classification decision.

10 CIT at 138, 630 F. Supp. at 1356–57 (emphasis added).

The language in *Detroit Zoo* that—"information * * * include[s] whatever is reasonably necessary for proper appraisement or classification"—is broad enough to cover the situation in this case. Nevertheless, the facts in *Detroit Zoo* are not precisely on point, because in *Detroit Zoo*,

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[6] After liquidation of data-processing peripheral devices resumed on March 18, 1988, the Los Angeles district director requested information from the importer. This request is not the claimed basis for the extension because it was made after the extension notice was mailed, although there may have been a general concern at the time the extension was granted that more information might be needed from the importer depending on Headquarter's formulation.

the delay was initiated by the importer, whereas in this case, Customs initiated the delay. The distinction is not meaningful under the statute, however. The statute permits an extension when "information" is needed: the statute does not specify the source of the information, nor does it require that the importer, as opposed to the "appropriate" Customs officer, initiate the delay.[7]

International argues that the extension was unjustified under § 1504(b)(1) because classification was purely a question of law—whether the disks should be considered part of data-processing units or as stand-alone devices. Taken to its logical conclusion, International's argument would prevent Customs from extending liquidation in any case where internal information was required prior to liquidation. Such a result finds no support in the statute, and would thwart Customs in the responsible performance of its duties. Based on the plain language of the statute, therefore, Customs may legitimately extend the time to liquidate when internal information is reasonably needed to classify or appraise merchandise.

*Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984), is instructive. In that case, the Federal Circuit considered whether Customs could extend liquidation under § 1504 on the grounds that the International Trade Administration ("ITA") was conducting the annual review required by statute of outstanding countervailing duty orders.[8] The ITA found that liquidation was properly extended under § 1504(b)(2), which permits suspension "if required by statute"; ultimately, ITA's decision was upheld by the Federal Circuit. See 748 F.2d at 1563, 1565. In reaching its decision, the Federal Circuit suggested that an extension may also have been proper under § 1504(b)(1) because information from ITA concerning subsidies was necessary before liquidation could occur. The court stated:

> If the Customs officers need more information for the proper appraisement or classification of merchandise, they may suspend. Information as to subsidies is not either appraisement or classification, exactly, but if information is equally necessary, it is an anomaly if the right to suspend to obtain it is denied. Liability to countervailing duties could well be considered an item of "classification."

*Ambassador*, 748 F.2d at 1563. The implication of this language is that § 1504(b)(1) should be construed sufficiently broadly for Customs to

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[7] International cites *Pagoda Trading Co. v. United States*, 9 CIT 407, 617 F. Supp. 96 (1985), *aff'd* 804 F.2d 665 (1986) for the proposition that the extension was improper. The case is inapposite. *Pagoda*, 9 CIT at 411, 617 F. Supp. at 100 (extension notices issued *after* countervailing duty order revoked and *after* Customs ordered to proceed with liquidation; extension notice improper).

[8] *Ambassador* involved merchandise from India that was entered or withdrawn from warehouses in the United States in 1980. In 1979, the Treasury Department determined that India had subsidized the merchandise prior to export, and imposed countervailing duties. Liquidations were suspended. In 1980, in accordance with its statutory mandate, 19 U.S.C. § 1675(a), ITA announced it would review all outstanding countervailing duty orders. ITA directed Customs to maintain the suspension of liquidation. In 1982, ITA published the results of its review, and ordered Customs to make assessments and final liquidations. ITA reasoned that since the statutory scheme required retroactive assessments, suspension of liquidation had been justified under 19 U.S.C. § 1504(b)(2). The Federal Circuit found ITA's interpretation reasonable.

cperform its obligations in a competent manner. Thus, liquidation may be extended when the delay is motivated by the legitimate need for additional information from within the government. It must be emphasized, however, that although Customs may as a matter of law extend the time to liquidate in order to obtain internal information, its actions will be reviewed for abuse of discretion.[9]

Even if an extension is allowed under the statute, it may be granted only for a reasonable period of time relative to the situation. *Detroit Zoo*, 10 CIT at 138, 630 F. Supp. at 1357. In this case, however, International has not argued that the *length* of the extension was unreasonable at the outset, and it is unclear from the motion papers whether Customs originally extended the time by less than the maximum one year permitted by the regulations. *See* 19 C.F.R. § 159.12(a). Here, notices extending liquidation of the entry were mailed on February 9, 1988; general liquidation of the product was resumed on March 18, 1988. On June 20, 1988, Customs requested data from the importer. It is quite possible that, had the importer responded, liquidation would have occurred within the original one-year period. The entry was liquidated on October 21, 1988, nineteen days after the anniversary date of the entry, which would tend to support Custom's view that it was acting in a reasonably expeditious manner.[10] International has not met its burden of showing abuse of discretion on this point.

In this case, where Customs has demonstrated that classification of disk drives was under review, and the Los Angeles district director was unable to classify without guidance from Headquarters, and International has failed to demonstrate that the extension was excessive or improvidently granted for other reasons, the decision to extend the time is found proper under § 1504(b)(1) and not an abuse of discretion.

## CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted, and plaintiff's motion for summary judgment is denied.

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[9] The result is not at odds with legislative intent. The intent of the statute is to eliminate uncertainty in customs transactions; as long as proper notice is given and Customs does not abuse its discretion by extending the time without cause, the statute is not undermined. This court notes the statement in *Enron*, however, that "mechanized mailing of tens of thousands of notices of extensions each week would seem to flout both the letter and spirit of the statute." Slip Op. 91-91 at 9. This case is distinguished from the situation described in *Enron* because Customs has demonstrated meaningful particularized decision-making combined with proper notice, and its claim has not been rebutted.

[10] While the extension was granted substantially in advance of the original deadline, nothing in the record indicates that the appropriate Customs official should have anticipated a sufficiently swift Headquarter's resolution and sufficiently prompt gathering of any needed data so as to meet the original deadline.

(Slip Op. 91-100)

NATIONAL KNITWEAR & SPORTSWEAR ASSOCIATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND PENINSULA KNITTERS LTD. AND FANG BROTHERS KNITTING LTD., DEFENDANT-INTERVENORS

Court No. 90-10-00537

[Plaintiff's motion for judgment upon the agency record is denied; Commerc's Final Determination is sustained in its entirely.]

(Dated November 15, 1991)

*Gibson, Dunn & Crutcher*, (*Donald Harrison* and *Judith A. Ott*), for Plaintiff.

*Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*), *Thomas G. Ehr*, Of Counsel, Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

*Grunfeld, Desiderio, Lebowitz & Silberman*, (*Bruce M. Mitchell*, *Max F. Schutzman*, and *David L. Simon*), for Defendant-Intervenors.

MEMORANDUM OPIONION AND ORDER

CARMAN, *Acting Chief Judge*: Plaintiff seeks review of the final detrmination of the International Trade Administration, United States Department of Commerce, entitled, *Final Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong*, 55 Fed. Reg. 30,733 (July 27, 1990) ("*Final Determination*"). Pursuant to Rule 56.1 of the Rules of this Court, Plaintiff seeks judgment upon the agency record regarding Commerce's action in excluding the affirmative dumping margin rate assigned to Prosperity, one of the respondents in the underlying investigation, in the "all others" rate. Defendant seeks to sustain the *Final Detrmination* as supported by substantial evidence on the record and otherwise in accordance with law. Defendant-Intervenors, Hong Kong manufacturers and exporters of the subject merchandise, join Defendant.

BACKGROUND

On September 22, 1989, National Knitwear & Sportswear Association ("NKSA") filed a petition concurrently with the United States Department of Commerce ("Commerce" or "Department") and the United States International Trade Commission ("Commission") for an antidumping investigation of sweaters made wholly or in chief weight of man-made fiber ("MMF sweaters") from Hong Kong, Twiwan, and the Republic of Korea. NKSA alleged that the imported sweaters were being, or were likely to be, sold in the United States at less than fair value and were materially injuring, or threatening material injury to, a United States industry. The case before this Court is limited to the investigation of MMF sweaters from Hong Kong.

The Department initiated an antidumping investigation of MMF sweaters from Hong Kong on October 19, 1989. *Initiation of Antidump-*

*ing Duty Investigations: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong, the Republic of Korea, and Taiwan*, 54 Fed. Reg. 42,972 (Oct. 19, 1989). On April 27, 1990, the Department published its preliminary determination finding that the subject sweaters from Hong Kong were being sold in the Untied States at less than fair value. *Preliminary Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong*, 55 Fed. Reg. 17,775 (Apr. 27, 1990). The preliminary determination was subsequently amended to correct a clerical error. *Amendment to Preliminary Determination of Sales at Less Than Fair Value; Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong*, 55 Fed. Reg. 19,289 (May 9, 1990). On July 27, 1990, the Department published its final determination of sales at less than fair value. *Final Determination*, 55 Fed. Reg. at 30,733. On September 24, 1990, following an affirmative injury determination by the Commission, Sweaters Wholly or in Chief Weight of Man-Made Fibers from Hong Kong, the Republic of Korea, and Taiwan, USITC Pub. 2312, Inv. Nos. 731–TA–448–450 (Final) (Sept. 1990), the Department published an antidumping duty order covering man-made fiber sweaters from Hong Kong. *Antidumping Duty Order: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong*, 55 Fed. Reg. 39,035 (Sept. 24, 1990).

In the *Final Determination*, the Department found that MMF sweaters from Hong Kong, except those of Crystal Knitters, Ltd. ("Crystal") and Laws Fashion Knitters, Ltd. ("Laws"), were being, or were likely to be, sold in the United States at less than fair value during the period of investigation. 55 Fed. Reg. at 30, 733. The overall weighted-average dumping margins for two respondents, Crystal and Laws, were considered zero and *de minimis* respectively, so that sweaters produced in Hong Kong by these respondents were excluded from the antidumping duty order. *See* 19 C.F.R. §§ 353.21(c), 353.6(a). The final dumping margin determined by the Department for the third respondent, Comitex Knitters, Ltd. ("Comitex"), was 5.86 percent. 55 Fed. Reg. at 30, 744. The fourth respondent, Prosperity Clothing Co., Ltd/Estero Enterprises, Ltd. ("Prosperity") was assigned a final dumping margin of 115.15 percent. *Id.*

In addition to calculating the antidumping margins for the respondents, Commerce must also calculate an "all others" rate for the remaining firms that were not investigated. In this case, for reasons set forth below, Commerce applied Comitex' 5.86 percent antidumping margin to the "all others rate and excluded Prosperity's 115.15 percent final dumping margin from this calculation. Plaintiff challenges Commerce's decision to exclue Prosperity's affirmative dumping margin, which was based on best information available, in the calculation of the "all others" rate.

## Standard of Review

Pursuant to the Tariff Act of 1930 ("Act"), in reviewing a final determination of the International Trade Administration, this Court must

uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). When applying the substantial evidence standard "'[t]he court may not substitute its judgment for that of the [agency] when the choice is between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. * * *'" *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984), *aff'd sub. nom. Armco, Inc. v. United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985) (quoting *Universal Camera*, 340 U.S. at 488).

In determining whether to sustain the agency's construction of the antidumping statute or regulations, the Court need not find the agency's interpretation to "be the *only* reasonable interpretation or the one which the court views as the most reasonable." *ICC Indus., Inc. v. United States*, 5 Fed. Cir (T) 78, 85, 812 F.2d 694, 699 (1987) (citing *Consumer Products Div., SCM Corp. v. Silver Reed America, Inc.*, 3 Fed. Cir. (T) 83, 90, 753 F.2d 1033, 1039 (1985). Moreover, judicial review of the agency determination is limited. *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (1990). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to refect a finding on grounds of a differing interpretation of the record." *Id.* (citations omitted).

In addition, where, as in the instant case, the statute does not provide explicit guidance on a particular issue, the agency acts within its discretionary authority to interpret the intention and purposes of the law. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450–51 (1978). "The question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is 'sufficiently reasonable' to be accepted by a reviewing court." *Id.* (citing *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75 (1975); *American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). In *American Lamb*, the Court stated:

> A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.' The agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding.

4 Fed. Cir. (T) at 54, 785 F.2d at 1001 (citations omitted).

## Discussion

### *The Methodology Employed by Commerce*

The Department's antidumping investigations are based on questionnaires sent to a number of foreign producers requiring that these producers (and related importers) provide information covering their sales during the Department's period of investigation which is normally the period five months before and one month after the first day of the month in which the petition was filed. *See* 19 C.F.R. § 353.42(b) (1990). The Department's antidumping regulations further provide that the Department "normally will examine not less than 60 percent of the dollar value or volume of the merchandise sold" during the period of investigation. *Id.*

However, in the instant case, it is undisputed that the Department did not follow its normal practice of sending questionnarires to foreign producers accounting for "not less than 60 percent" of sales during the period of investigation. Instead, the Department sent questionnaries to only four Hong Kong companies that the Department identified as the major quota holders to export MMF sweaters from Hong Kong to the United States during the period of investigation. The four respondents were Comitex Knitters, Ltd. ("Comitex"), Crystal Knitters, Ltd. ("Crystal"), Laws Fashion Knitters, Ltd. ("Laws"), and Prosperity Clothing Co., Ltd./Estero Enterprises, Ltd. ("Prosperity").

The antidumping law allows Commerce to depart from normal procedure when a significant volume of sales is involved or a significant number of adjustments to prices is required by employing averaging or generally recognized sampling techniques. 19 U.S.C. § 1677f–1(a) (1988). In this case, the Department departed from the normal practice of investigating "not less than 60 percent" of the dollar value or volume of sales because of the large number of manufacturers and exporters in each country that would be necessary to achieve 60 percent coverage. *Preliminary Determination*, 55 Fed. Reg. at 17,775.

Moreover, the Department determined that due to the lack of industry-specific information on the record, the Department would be unable to develop a representative sample. *Id.* Consequently, the Department decided not to limit the selection of respondents by sampling. Instead, due to statutory deadlines, the Department limited its analysis by investigating only those companies accounting for the top 30 percent of the total 1989 "quota allocations" among Hong Kong exporters of the subject merchandise rater than the "normal" 60 percnet of exports to the Untied States as stated in 19 C.F.R. § 353.42(b). *See Final Determination*, 55 Fed. Reg. at 30,736–37.

This presented a further departure from the regulations because the Department normally bases respondent selection on shipments or sales to the United States during a given period of time. However, in this case, because the data available to the Department regarding shipments to the United States was qualified and incomplete, the department based

respondent selection on "quota allocations," which was "the only complete information available at that time." *Id.* at 30,736.

The antidumping law also requires the Department to "verify all information relied upon" in its final determinations in antidumping investigations and further requires the Department to "report the methods and procedures used to verify such information." 19 U.S.C. § 1677e(b) (1988). In adding these verification requirements to the law in 1979, Congress indicated that the requirements were intended to address "[n]umerous complaints * * * made regarding the current practices on verification of information submitted to the Department of the Treasury in antidumping and countervailing duty proceedings," and that if the "information cannot be verified, the administering authority must then use the best information available in making its determination." S. Rep. No. 249, 96th Cong., 1st Sess. 98, *reprinted in* 1979 U.S.C.C.A.N. 381, 484.

In the present action, the Department's investigation was marked by several developments relating to the verification and certification requirements for one of the four respondents selected by the Department, specifically Prosperity. Two days before the scheduled verification, the United States counsel for Prosperity informed Commerce officials that Prosperity, for reasons not explained, would not permit verification of any of the information that counsel had submitted to the Department on behalf of Prosperity and that the law firm representing Prosperity was withdrawing as counsel for Prosperity.

Because Prosperity did not permit verification of any of its submissions, the Department decided pursuant to the antidumping law to "use the best information available to it as the basis for its" final determination. 19 U.S.C. § 1677e(b); *see* 19 C.F.R. § 353.37 (1990). The antidumping law further provides that the best information available may include "the information submitted in support of the petition." 19 U.S.C. § 1677e(b). In this case, the Department determined that the best information available on the margin for Prosperity was the highest margin alleged in the petition, that is, 115.15 percent. 55 Fed. Reg. at 30,734.

In addition to calculating the final dumping margins for the four respondents subject to the investigation, the Department also calculated the "all others" rate. This "all others" rate is the basis of the estimated antidumping duties that impoters of the subject merchandise produced by all companies other than the specific respondents must deposit when the merchandise is entered into the United States. *See* 19 U.S.C. § 1673e(b)(1) (1988). It is the Department's general practice to calculate the "all others" rate as a weighted average of all affirmative antidumping margins, including those based on the best information available, excluding only respondents with zero or *de minimis* margins. *See* 55 Fed. Reg. at 30,738. In this case, however, the Department calculated the "all others" rate at 5.86 percent, equal to the dumping margin calculated for Comitex, without including the affirmative dumping margin of 115.15 percent determined for Prosperity. *Id.* at 30,744.

This Court must determine whether the Department's action in excluding the affirmative dumping mergin assigned to Prosperity, based on best information available, in its calculation of the "all others" rate was proper.

The statute does not prescribe the methodology by which the Department is directed to calculate the "all others" rate. Section 736 of the Tariff Act of 1930 ("Act"), *as amended*, 19 U.S.C. § 1673e(a)(1) (1988), provides that an antidumping duty order shall

> direct [ ] customs officers to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise. * * *

Section 735 of the Act, *as amended*, 19 U.S.C. § 1673d(a)(1) (1988), governing final antidumping determinations, states that the Department shall

> make a final determination of whether the merchandise which was the subject of the investigation is being, or is likely to be, sold in the United States at less than its fair value.

Moreover, the legislative history[1] and the Department of Commerce antidumping regulations are also silent as to the method of calculating the "all others" rate.[2] Therefore, because neither the statute nor the regulations provides any explicit methodology by which the Department is required to calculate the "all others" rate, the mehtodology used in a particular case is subject to the discretion of the Department.

This Court, in its review of the methodology employed by the Department, must determine if the manner in which the Department calculated the "all others" rate was reasonable. In applying this standard, the Court has stated that:

> As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.

*Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

When an agency relies on its methodologies and procedures, it "must either follow its existing precedents or provide a reasonable explanation for its deviation or noncompliance." *Western Conference of Teamsters v. Brock*, 13 CIT ____, 709 F. Supp. 1159, 1169–70 (1989), quoting *ILWU Local 142 v. Donovan*, 9 CIT 620, 625 (1985), *reh'g denied*, 10 CIT 161 (citing *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954)); *NTN Bearing Corp. of America v. United States*, 14 CIT ____,

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[1] *See* S. Rep. No. 249, 96th Cong., 1st Sess. 71–77, *reprinted in* 1979 U.S.C.C.A.N. 381, 457–63 (1979).

[2] The regulation governing final determinations requires the Secretary's final determination to include "[t]he estimated weighted-average dumping margin, if any, for each person investigated." 19 C.F.R. § 353.20(a)(2)(ii) (1990).

747 F. Supp. 726, 736 (1990). In *NTN Bearing* the Court further articulated this standard in stating that

> Commerce has traditionally been granted broad discretion in the selection of methodology implemented to achieve its manadate. Hence, absent a showing of unreasonableness on the part of the agency, its choice of methodology shall be sustained. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987). Moreover, it is the administering agency rather than an interested party that should make the determination as to what methodology should be used. *Timken I*, 10 CIT at 98, 630 F. Supp. at 1338.

14 CIT at ____, 747 F. Supp. at 736.

In this case, Commerce did not follow its general practice of including best information available rates in the calculationof the "all others" rate because, due to unusual circumstances discussed below, Commerce determined that the best information available rate assigned to Prosperity was not representative of the pricing practices of the noninvestigated companies. The Department reasons that its departure from its general practice was based on: 1) the disparity between the three verified rates and the highest rate in the petition[3], *i.e.*, approximately 20 times greater; 2) its examination of only the top 30 percent of total quota holdings; and 3) the small number of firms investigated, *i.e.*, four from a potential pool of over 300 firms. 55 Fed. Reg. at 30,738.

Plaintiff, in support of its argument, relies on numerous determinations setting forth the Department's general practice to calculate the "all others" rate as a weighted average of all affirmative antidumping margins, including those based on the "best information available," excluding only respondents with zero or *de minimis* margins. *See* 55 Fed. Reg. at 30,738; *see, e.g., Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 45,447 (Oct. 31, 1985). Closer scrutiny of the following determinations relied on by Plaintiff reveals distinguishable facts from this case.

In *Photo Albums and Filler Pages From Korea; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 43,754 (Oct. 29, 1985), the Department investigated six companies which accounted for 64% of all exports of photo albums and filler pages from Korea. The Department relied on best information available for United States Price ("USP") and Foreign Market Value ("FMV") because adequate responses were not submitted in an acceptable form by all of the six respondents. *Id.* at 43,755. In *64K Dynamic Random Access Memory Components (64K DRAM's) From Japan; Preliminary Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 50, 649 (Dec. 11, 1985), the Department submitted questionnaires to four firms that accounted for a significant proportion of exports. The Department assigned a 94 percent antidump-

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[3]Crystal was assigned 0.00 margin, Laws – 0.22 percent margin, Comitex – 5.86 percent margin, and Prosperity – 115.15 percent margin. 55 Fed. Reg. at 30,744.

ing duty margin to one respondent, Mitsubishi, because it failed to provide usable U.S. sales information on computer tape. *Id.* at 50,650. This 94 percent margin was used in calculating the "all others" rate in the preliminary determination. The Department, however, adjusted Mitsubishi's margin to 13.43 percent in its final determination based on corrected information which Mitsubishi provided. *64K Dynamic Random Access Memory Components (64K DRAM's) From Japan: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 15,943, 15,954 (Apr. 29, 1986).

Plaintiff's reliance on *Antidumping; Fuel Ethanol From Brazil; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 5572 (Feb. 14, 1986) is inapposite because the Department did not rely on best information available in calculating United States price and foreign market value for the two respondents investigated. Rather, the Department relied on the verifiable information submitted by the companies, which accounted for approximately 90 percent of sales of fuel ethanol to the United States during the period of investigation. *Id.* at 5573. The fact that the Department determined high margins for both companies, 101.12 percent and 56.48 percent respectively, bears no weight to the facts of the present case.

In *Antidumping; Malleable Cast Iron Pipe Fittings, Other Than Grooved, From Taiwan; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 10,901 (Mar. 31, 1986), the Department investigated five companies that accounted for more than 60 percent of the exports to the United States during the period of investigation. *Id.* at 10,902. One of those companies, Young Shieng, did not respond to the questionnaire. Accordingly, the Department assigned it an 80 percent antidumping duty margin based on best information available. The Department also included this margin in the "all others" rate. The facts of this determination are distinguishable from those in the instant case because over 60 percent of the industry was investigated. Moreover, verified affirmative antidumping duty margins were assigned to the other four companies investigated ranging from 7.93 percent to 58.57 percent.

This Court has also recognized Commerce's general practice in calculating the "all others" rate in *Serampore Indus. Pvt., Ltd. v. United States*, 12 CIT 825, 828–29, 696 F. Supp. 665, 669 (1988). In *Serampore*, the Court noted Commerce's general practice in calculating the "all others" rate is to include all investigated firms that receive affirmative margins, including those based upon best information available. *Id.* The rational for including firms that have been assigned a best information available rate for failure to cooperate in the investigation is based upon Commerce's assumption that such firms which fail to cooperate are "more probably than not dumping." 12 CIT at 829, 696 F. Supp. at 669. (citation omitted). Following this rationale, the Court in *Serampore* noted that "[a]n all others rate that excludes margins based on the best information available would * * * with one exception, be skewed to reflect the pricing practices of nondumping firms rather than those firms

that choose not to cooperate with Commerce's investigation." *Id.* The one exception the Court referred to involves the situation where a firm cannot cooperate with the investigation for reasons beyond its control, such as when a company goes out of business. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Fresh Cut Flowers From Ecuador*, 52 Fed. Reg. 2128, 2132 (Jan. 20, 1987) (Department excluded the best information available rate used for Eden flowers in the "all others" rate because the firm "virtually collapsed" and many of the records disappeared when the original organizers left the company).

After an exhaustive review of the Department's general practice in this area, this Court finds that merely because the Department relies on best information available in its determinations, does not necessarily elicit blanket approval for use of antidumping duty margins based on best information available to be calculated in the "all others" rate. Moreover, Plaintiff seems to place great weight upon the "one exception" articulated in *Serampore*. This Court, however, finds that such a circumstance when a company goes out of business and, therefore, cannot fully or accurately respond to the questionnaire or participate in the investigation may be an occasion for one exception. Depending on the facts of another case, there may be occasions for other exceptions as well.

Such an occasion may be found in the facts of this case where only 30 percent, rather than the usual 60 percent, of the industry was investigated. In addition, that 30 percent was based on quota holdings instead of actual exports. It appears to this Court that such a stark deviation from Commerce's general practice in its traditional respondent-selection methodology for reasons set forth herein could lead to an inequitable result, thereby tipping the burden to the remaining firms that did not participate in the investigation. In any event, although this abviously was not an ideal set of circumstances from the point of view of Commerce, it would seem that Commerce decided that it had little alternative based upon the information submitted to disregard the best information available rate of 115.15 percent for Prosperity. If Plaintiff is frustrated by such results, then it should have contested those issues fully at the administrative level. It cannot be permitted to raise these issues de novo at this point of the review.

Plaintiff submits that the Department's reason for deviating from its traditional respondent-selection methodology is "nonsensical" because the Department limited the number of respondents." Brief in Support of Plaintiff's Motion for Judgment on the Agency Record at 32. Thus, argues Plaintiff, the Department should not "be allowed to 'boot-strap' its decision on the 'all others' rate calculation from its own mistake in unreasonably limiting the number of respondents." *Id.*

Defendant points out that Plaintiff is precluded from raising the "60 percent issue" because Plaintiff failed to exhaust its administrative remedies. Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Administrative Record ("Defendant's

Brief") at 15. Although during the administrative proceedings, Defendant maintains, Plaintiff argued that Commerce should select a number of companies to cover the largest number of exports, Plaintiff failed to raise the 60 percent issue before Commerce and, therefore, should be precluded from raising it now.

Section 2637 (d) of Title 28, United States Code, directs this Court to require, where appropriate, the exhaustion of administrative remedies. 28 U.S.C. section 2637 (d) (1988). It is well established that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36037 (1952); *Koyo Seiko Co., Ltd. v. United States*, 15 CIT ____, 768 F. Supp. 832, 835 (1991); *Kokusai Elec. Co. v. United States*, 10 CIT 166, 171, 632 F. Supp. 23, 28 (1986).

This Court observes that a failure to enforce the exhaustion of administrative remedies principle could lead to "frequent and deliberate flouting of the administrative processes [that] could weaken the effectiveness of an agency by encouraging people to ignore [administrative] procedures." *McKart v. United States*, 395 U.S. 185, 195 (1969). Further, the courts require exhaustion of administrative remedies to ensure that the egency and the interested parties fully develop the facts to aid judicial review. *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984). Ultimately, applying the exhaustion principle promotes judicial economy by avoiding duplication of fact-finding and, sometimes, judicial involvement altogether. *Id.*

This Court finds that Plaintiff did not contest in its complaint Commerce's deviation from its "normal" practice of investigating 60 percent of the industry, when it opted to only investigate 30 percent of the industry. Therefore, Plaintiff is precluded from raising that issue now. The Court takes notice, however, that Commerce deviated substantially from the statute when it relied on quota holdings and only investigated 30% of the industry based on those quota holdings.

It appears to this court that Plaintiff could have raised these issues in the proceedings before Commerce regarding the type of investigation Commerce undertook and its deviation from the traditional respondent-selection methodology. Precisely because Plaintiff did not contest these issues, this Court will not consider whether basing the investigation on quotas versus actual exports was correct. To do so would preclude the Court from the benefit of the analysis and consideration by the administrative agency.

Plaintiff also asserts that the Department's action frustrates the remedial purpose of the antidumping law. Commerce counters that, under these unusual circumstances, the inclusion of Prosperity's best information available rate in the calculation of the "all others" rate would

have amounted to punishment of innocent parties and, therefore, would not provide for the remedial relief contemplated by the antidumping law. Defendant's Brief at 17–18.

As the courts have long recognized, the antidumping law is a remedial statute. *Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) ___, ___, 901 f.2d 1097, 1103–04 (1990). Thus, dumping duties are remedial, not penal, in nature. They "are 'additional duties' to equalize competitive conditions between the exporter and American industries affected." *Imbert Imports, Inc. v. United States*, 67 Cust. ct. 569, 576, 331 F. Supp. 1400, 1406 n.10 (1971), aff'd 60 CCPA 123, CAD 1094, 475 F.2D 1189 (1973) (*citing C.J. Tower & Sons v. United States*, 21 CCPA 417, T.D. 46, 943, 71 F.2d 438 (1934)). In *Badger-Powhatan v. United States*, 10 CIT 241, 250, 633 F. Supp. 1364, 1373 (1986), the Court concluded "that the statutory scheme [of the anitdumping laws] requires that estimated antidumping duties be as closely tailored to actual antidumping duties as is reasonable given data available to ITA at the time the antidumping order is issued." (footnote omitted).

This Court found in *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT ___, 717 F. Supp. 834, 837 (1989), that the exclusion of best information available rates from the "all others" rate, when they do not appear to be representative of the pricing practices in the country under investigation, may be reasonable because the inclusion of best information available rates can result in the application of "quasi-punitive rates to innocent parties." In *Asociacion Colombiana*, the Court stated that "parties not volunteering are not guilty of something which requires punitive action," but are entitled to a "fair rate related to actual industry behavior, not a rate unduly related to petitioner's claims." 13 CIT at ___, 717 F. Supp. at 838, n.5. Furthermore, the Court in *Asociacion Colombiana* found that

> Because the verified rates are so much lower than petitioner's rate and because some or all of the nonresponding companies appear to have had no motivation to respond, even if their rates would have been far below petitioner's, blanket use of petitoner's rate to calculate the 'all other rate' is not appropriate.

*Id.* at 837.

This Court finds that the application of a punitive, or even quasi-punitive, rate to innocent parties, such as the 353 companies affected by the "all others" rate, would be contrary to the antidumping duty law, which is intended to be remedial, not punitive. In the situation in which Prosperity's best information available rate is almost 20 times higher than the highest rate calculated upon the basis of verified information and two of the four respondents had zero or *de minimis* margins, there is simply no basis for assuming that Prosperity's best information available rate represents the pricing practices of the producers and exporters of the remaining 70 percent of the MMF sweaters exported from Hong Kong. Furthermore, the close relationship that some of these man-made fiber sweater companies appear to have with each other causes one to

speculate why Prosperity refused to cooperate at the last part of the investigation. One might surmise that a possible motivation could have been to skew the computation of the "all others" rate to the disadvantage of competitors.

The antidumping statute requires that where reaching the 60 percent coverage would require investigation of an unusually large number of exporters, the Department may "use averaging or generally recognized sampling techniques" to select respondents. 19 U.S.C. section 1677f-1(a) (1988); 19 C.F.R. section 353.59 (b) (1990). Where the Department does use sampling or averaging, "such samples and averages shall be *representative* of the transactions under investigation." 19 U.S.C. section 1677f-1 (b) (emphasis added). In *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT ____, 704 F. Supp. 1114, 1121 (1989), the court stated that the "ITA decided that sampling was required because of the large number of transactions involved, but more importantly, because the Colombian industry was composed of numerous small producers. * * * The second requirement under the statute is that the type of sampling employed yield representative resluts."

In the present case, the Department considered and rejected the use of generally recognized sampling techniques based on the science of statistical sampling. Administrative Reocrd Document 50. Commerce then decided to use a modification of its traditional methodology to select respondents. The Department, in its Final Determination, in its *Final Determination*, stated:

> Normally, we base respondent selection on shipments or sales to the United States during a given period of time, as we did in the investigations of MMF sweaters involving the Republic of Korea and Taiwan. However, in this case, given the qualified and incomplete data available regarding shipments to the United States, we based respondent selection on the only complete information available at the time, *i.e.*, quota allocations. Based on this analysis, Comitex, Crystal, Laws, and Prosperity (combined with their related companies) accounted for 30 percent of the 1989 Hong Kong quota allocations.

*Final Determination*, 55 Fed. Reg. at 30, 736–37.

The representativeness of the investigated exporters is the essential characteristic that justifies an "all others" rate based on a weighted average for such respondents. *Serampore*, 12 CIT at 828, 696 F. Supp. at 668. For example, the Department has excluded from the "all others" rate a firm that it concluded was not representative of the unnamed exporters. Commerce states that:

> For purposes of this final determination * * * the Department has determined that the application of the BIA rate for Taiwan Nitsuko to the "All Others" rate is inappropriate. The Department does not believe that the BIA rate calculation for Taiwan Nitsuko is representative of other unnamed Taiwan manufacturers because, as previously explained, the Department applied section 773 (d) of the Act (the MNC [mulnational corporation] provision) to calculate Tai-

> wan Nitsuko's BIA rate. This resulted in comparisons being based only on merchandise produced and sold in Japan to that produced in Japan and sold in the United States.

*Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems Thereof From Taiwan*, 54 Fed. Reg. 42,543, 42,550 (Oct. 17, 1989). The "all others" rate issue in Commerce's final determination of *Certain Small Business Telephone Systems Thereof From Taiwan* was contested by the Taiwanese manufacturers and exporters of small business telephone systems and subassemblies in *Auto Telecom Co. v. United States*, 15 CIT ___, 765 F. Supp. 1094 (1991). The Court found in *Auto Telecom* that

> [a]lthough Commerce ordinarily would have assigned the rate of 129.73 percent to the 'all other' category, *see, e.g., Certain Steel Wire Nails from Korea*, 47 Fed. Reg. 27392 (1982), a departure in this case was warranted given the circumstances and Commerce's obligation to be fair to everyone affected by its determinations, including non-participants. *See Asociacion Colombiana De Exportadores De Flores v. United States*, 13 CIT ___, ___, a right to expect that Commerce's techniques will yield a fair rate related to actual industry behavior.), aff'd, 901 F.2d 1089 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 136, 112 L.Ed.2d 103 (1990).

*Id.* at 1096–97 (footnote omitted). The Court, however, never reached the issue of whether Commerce should have calculated the 129.73 percent margin assigned to Taiwan Nitsuko in the "all others" rate or even whether the inclusion of that margin would be fair because these issues were not before the Court. See id. at 1098 n.11.

This Court holds that the Department's exclusion of Prosperity's margin from the "all others" rate was a reasonable and proper exercise of administrative discretion based upon the unusual facts referred to throughout this opinion. Neither the statute nor the regulations prescribe the method by which the Department of Commerce must calculate the "all others" rate. Moreover, due to the fact that Plaintiff acquiesced in the deviation of the traditional methodology employed by Commerce at the administrative level, under the unusual circumstances of this case, Plaintiff has not exhausted its administrative remedies.

Based on the facts before this Court, it appears that Prosperity was not representative of the remaining firms in Hong Kong that were not named as respondents in the investigation because of the gross disparity between the Prosperity rate of 115.15 percent, based on best information available, and the next-highest Hong Kong rate of 5.86 percent and the exceptionally small number of respondents investigated—four out of a potential pool of over 350 firms. Thus, based on these unusual circumstances of the respondent-selection methodology, this Court finds that it was reasonable and proper for Commerce to exclude Prosperity from the "all others" rate.

For all the reasons discussed herein, this Court finds that the Department of Commerce acted within its discretion in excluding the Prosper-

ity best information available rate of 115.15 percent from the calculation of the "all others" rate. Plaintiff's motion for judgment upon the agency record is denied. Commerce's final determination is upheld as supported by substantial evidence on the record and in accordance with law. This action is dismissed.

ABSTRACTED CLASSIFIC

| DECISION NO./DATE JUDGE | PLAINTIFF | COURT NO. | ASSESSE |
|---|---|---|---|
| C91/315 11/5/91 Aquilino, J. | Delta Impex Watch Corp. | 88-2-00115 | 716.09–716.4 715.05, etc. Various rat |
| C91/316 11/5/91 Restani, J. | Nissho Iwai American Corp. | 85-10-01346 | 700.95 12.5% |
| C91/317 11/5/91 Restani, J. | Nissho Iwai American Corp. | 85-11-01574 | 700.95 12.5% |
| C91/318 11/7/91 Goldberg, J. | Belwith Int'l, Inc. | 82-3-00349 | 534.94 Various rat |
| C91/319 11/7/91 Musgrave, J. | Brother Int'l Corp. | 86-10-01329 | 389.62 Various rat |
| C91/320 11/7/91 Aquilino, J. | E. Gluck Corp. | 84-2-00274 85-8-01041 88-2-00065 | 716.09–716.4 715.05, etc. Various rat |
| C91/321 11/8/91 Aquilino, J. | Dynamic Supply, Inc. | 86-6-00793 | 716.09–716.4 715.05, etc. Various rat |

## ...CATION DECISIONS

| ...ED | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|---|---|---|---|
| ...5,<br>...c.<br>...tes | 688.45, 688.42,<br>688.43, 688.36, etc.<br>Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York<br>Quartz analog watches, etc. |
| | 700.35<br>8.5% | Mitsubishi Int'l *v.* U.S., S.O. 87-136 (1987) | Portland, ME<br>Footwear |
| | 700.35<br>8.5% | Mitsubishi Int'l *v.* U.S., S.O. 87-136 (1987) | San Francisco<br>Footwear |
| ...tes | 727.55, 727.70<br>Various rates | Agreed statement of facts | Detroit<br>Porcelain knobs |
| ...tes | 676.50<br>Various rates | Agreed statement of facts | New York, etc.<br>Ribbons mounted on spools or encased in cartridges and used for typing or printing |
| ...5,<br>...:.<br>...tes | 688.45, 688.42,<br>688.43, 688.36, etc.<br>Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York<br>Quartz analog watches, etc. |
| ...5,<br>...:.<br>...tes | 688.45, 688.42,<br>688.43, 688.36, etc.<br>Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York<br>Quartz analog watches, etc. |

| | | | |
|---|---|---|---|
| C91/322<br>11/8/91<br>Aquilino, J. | Eastman Watch Co. | 88–2–00147 | 716.09–716.4[illegible]<br>715.05, etc.<br>Various rat[illegible] |
| C91/323<br>11/8/91<br>Carman, J. | Ero Industries | 89–8–00477 | 386.11<br>12.5% or 1[illegible] |
| C91/324<br>11/8/91<br>Aquilino, J. | World Forum Watch, Ltd. | 84–10–01460 | 716.09–716.4[illegible]<br>715.05, etc.<br>Various rat[illegible] |
| C91/325<br>11/14/91<br>Restani, J. | Electrohome Ltd. | 90–1–00032 | 8528.10.8050<br>4.5% or 3.[illegible] |
| C91/326<br>11/15/91<br>Aquilino, J. | Accutime Watch Corp. | 87–3–00526 | 716.09–716.4[illegible]<br>715.05, etc.<br>Various rat[illegible] |
| C91/327<br>11/15/91<br>Aquilino, J. | D&M Watch Corp. | 84–4–00473 | 716.09–716.4[illegible]<br>715.05, etc.<br>Various rat[illegible] |
| C91/328<br>11/15/91<br>Aquilino, J. | Eastman Watch Co. | 87–3–00514 | 716.09–716.4[illegible]<br>715.05, etc.<br>Various rat[illegible] |
| C91/329<br>11/15/91<br>Aquilino, J. | E. Gluck Corp. | 87–11–01098 | 716.09–716.4[illegible]<br>715.05, etc.<br>Various rat[illegible] |

| | | | |
|---|---|---|---|
| 45, c. ates | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 10% | 386.13 or 386.14 Free of duty | Agreed statement of facts | Los Angeles, Savannah Sleeping bag shells |
| 45, c. tes | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 0 7% | 8471.92.40 Free of duty | Agreed statement of facts | Buffalo Data graphics projector systems |
| 45, c. tes | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 45, c. tes | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 45, c. tes | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 45, c. tes | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |

ABSTRACTED CLASSIFICATI

| DECISION NO./DATE JUDGE | PLAINTIFF | COURT NO. | ASSESS |
|---|---|---|---|
| C91/330 11/15/91 Aquilino, J. | F&K Watch Co. | 87–11–01072 | 716.09–716 715.05, e Various r |
| C91/331 11/15/91 Aquilino, J. | F&K Watch Co. | 88–7–00531 | 716.09–716 715.05, e Various r |
| C91/332 11/15/91 Aquilino, J. | Grundig Electric Co. | 88–4–00267 | 716.09–716 715.05, e Various r |
| C91/333 11/15/91 Aquilino, J. | World Forum Watch | 85–10–01523 | 716.09–716 715.05, e Various r |

ION DECISIONS – Continued

| SED | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|---|---|---|---|
| 6.45, etc. rates | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 6.45, etc. rates | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 6.45, etc. rates | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |
| 6.45, etc. rates | 688.45, 688.42, 688.43, 688.36, etc. Various rates | Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982) | New York Quartz analog watches, etc. |

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